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No. 343

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

STATEMENT AS TO JURISDICTION AND MOTION TO ADVANCE

In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

STATEMENT AS TO JURISDICTION ON APPEAL

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States and the Interstate Commerce Commission, appellants, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the above-entitled case on appeal.

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A. The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree complained of is conferred by:

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. III, Tit. 28, Sec. 45a).

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (4); U. S. Code, Tit. 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III).

B. The final decree sought to be reviewed was entered July 21, 1939. The petition for appeal was filed and the order allowing the appeal was entered August 28, 1939.

C. This suit was brought by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company and as Trustees of the Estate of The Chicago, Rock Island and Gulf Railway Company, against the United States and the Interstate Commerce Commission to enjoin, set aside, and annul certain conditions attached to an order of the Interstate Commerce Commission, dated October 29, 1938, as affirmed by its order of April 3, 1939, in a proceeding then pending before it entitled "Finance Docket No. 11847, *Chicago, Rock Island and Gulf Railway Company Trustees Lease.*"

On November 8, 1937, the Trustees applied to the Interstate Commerce Commission for authority

under Section 5 (4) of the Interstate Commerce Act to lease the properties of the Gulf Company and as trustees of the Rock Island Company to enter into and accept such lease, the lease to run until the termination of the pending reorganization proceedings under Section 77 of the Bankruptcy Act of either the Gulf Company or the Rock Island Company.

After hearings were held and two reports issued, the Commission entered its order on April 3, 1939, authorizing the Trustees to consummate the lease, conditioned, however, upon the Trustees' acceptance of four terms, set out in full in the report, but which, briefly summarized, seek to prevent, for a period of five years, any reduction in salary of the retained employees who are affected by the lease; require an allowance for employees who are dismissed as a result of operation under the lease and who are unable to secure other employment, and require reimbursement of transferred employees for traveling and other expenses and losses incurred in connection with the transfer of their place of residence made necessary because of operation under the lease.

The Trustees filed this suit on May 24, 1939, praying that the Court annul and enjoin that part of the Commission's order which consists of said conditions, on the sole ground that the subject of the conditions was not within the Commission's authority or jurisdiction. The answers of the United States and the Interstate Commerce Com-

mission denied the alleged lack of authority in the Commission and challenged the Court's power to segregate the conditions from the order as a whole and to annul them without annulling and enjoining the order in its entirety.

Final hearing was held before a statutory court of three judges on July 12, 1939, at the conclusion of which the Court orally announced its decision sustaining its power to annul the conditions apart from the order as a whole, and holding that the conditions imposed by the Commission were beyond the power conferred upon it by the Interstate Commerce Act. The Court expressly declined to rule upon the validity or legal effect of the Commission's order with the conditions annulled and eliminated. Findings of fact, conclusions of law, and final decree were filed July 21, 1939, and a written opinion embodying the decision previously announced was filed July 31, 1939. The final decree permanently enjoins, annuls, and sets aside the conditions attached to the Commission's order, and expressly refrains from passing upon the validity of the order with the conditions annulled.

D. The questions presented are substantial and of public importance. Whether the courts have power to annul the terms and conditions subject to which the Commission finds a proposed lease to be in the public interest, without nullifying the entire order, and whether the Commission's authority under Section 5 (4) of the Act to attach to its approval of a proposed lease or acquisition

such reasonable terms and conditions as it finds necessary to promote public interest includes conditions affecting the welfare of substantial groups of railroad employees are questions which will continue to arise in proceedings before the district courts and the Commission, respectively, until finally determined by the Supreme Court.

E. The following cases sustain the jurisdiction of the Supreme Court to review the decree of the district court:

Atlantic Coast Line R. Co. v. *United States*, 284 U. S. 288.

Chicago Junction Case, 264 U. S. 258.

Ches. & Ohio Ry. Co. v. *United States*, 283 U. S. 35.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 282 U. S. 311.

N. Y. Central Securities Co. v. *United States*, 287 U. S. 12.

Copy of the opinion of the District Court is appended hereto.

NEUMAN A. TOWNSEND,
Solicitor General.

WILLIAM J. CAMPBELL,
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THURMAN ARNOLD,
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For the United States of America.

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E. M. REIDY,
For the Interstate Commerce Commission.

In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

SUIT BY FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company and as Trustees of The Chicago, Rock Island and Gulf Railway Company against the United States and the Interstate Commerce Commission for an order enjoining, setting aside, and annulling a part of the order of the Interstate Commerce Commission dated April 3, 1939, which imposed certain conditions upon the Plaintiffs

Before EVANS, Circuit Judge, WOODWARD, District Judge, and DUFFY, District Judge

PER CURIAM: The Chicago, Rock Island and Pacific Railway Company, comprising 8,138 miles

of railroad (hereinafter referred to as the "Pacific Company"), and The Chicago, Rock Island and Gulf Company comprising 652 miles of railroad (hereinafter referred to as the "Gulf Company"), are both in bankruptcy for the purpose of reorganization under Section 77 of the Bankruptcy Act. The plaintiffs were appointed Trustees of both properties. The Pacific Company owns all of the capital stock and the bonds of the Gulf Company. Notwithstanding the separate organization, the Gulf Company is a component part of the Rock Island System.

On November 8, 1937, the petitioners, who are plaintiffs herein, filed with the Interstate Commerce Commission an application for authority under paragraph (4) of Section 5 of the Interstate Commerce Act to lease the railway and properties of the Gulf Company. Hearings were had by the Commission, and Division Four thereof issued its report dated October 29, 1938, in which it was found:

> Subject to the foregoing conditions, we find that the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company and of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of the

Commission's plan for the consolidation of railroad properties, and will promote the public interest.

No order will be entered approving and authorizing the lease pending notice to us that the applicants accept the foregoing conditions.

Said findings further stated:

No change in train operations is herein involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes.

The findings also contained the following provision:

The only change which will be effected, if the lease be approved, will be in the accounting department of the Gulf at Fort Worth. The applicants show that duplication of accounting could be eliminated in connection with interline and foreign freight, equipment rents and repairs, purchase of company material, pay rolls, and to a minor extent in connection with passenger traffic, and that unified operation as proposed would permit discontinuance of the compilation of separate statistics and the making of separate reports. This change would be brought about by the transfer of 20 employees from Fort Worth to the accounting department of the Rock Island at Chicago, and the dis-

missal of 49 employees, unless business increased sufficiently to warrant the retention of a greater number of men, resulting in an estimated annual saving of $100,000, of which $6,000 or $7,000 would accrue to the Gulf and the remainder to the Rock Island. On argument, counsel for the applicants stated that since the hearing in this case, it has been determined that the 20 employees referred to will be retained at Fort Worth for the present. The estimate does not include a possible saving of $5,925 for office rent at Fort Worth, which is dependent upon whether the vacated office space can be sublet. The general officers of the Gulf will continue to represent Rock Island interests, but as officers of the Rock Island, and as at present some of them will have jurisdiction of Rock Island lines outside of the State of Texas. The testimony is that no saving could be effected except by the dismissal and transfer of employees involved.

The following finding also was made:

It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce. We are of the opinion, however, that provision should be made for the protection of the employees who will be forced to accept positions at reduced compensation, or who will be dismissed, or who will

be required to change the place of their employment, as a result of operation under the lease herein considered.

The entire Commission affirmed the findings of Division Four.

Petitioners obtained a reargument before the entire Commission, and on April 3, 1939, the Commission issued its report and entered an order authorizing said lease, but only upon conditions which may be summarised as follows:

RETAINED EMPLOYES

(a) No employe of either party to the lease shall, for 5 years after lease operation begins, be placed, as a result of lease operations, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of lease operations, as long as he is unable in the exercise of seniority rights, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at such date of commencement; as long as he is unable to obtain such equal compensation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation actually received under lease operations and monthly compensation of the position in which he was displaced.

(b) If required to change the point of his employment as the result of lease operation, and if required thereby within one year from commencement thereof to move his

place of residence, he shall be reimbursed for expense of moving his household effects and traveling expenses of himself and immediate family; also his actual wage loss, not exceeding two days.

(c) Any employe shall be protected against any loss suffered in the sale of his home within one year of the effective date of lease operations, for not less than its fair value; or against loss in securing the cancellation of an unexpired lease of a dwelling house occupied as a home by such employe.

DISMISSED EMPLOYES

(a) Any employe who is dismissed because his position is abolished or because he loses it by exercise of seniority rights by an employe whose position is abolished as a result of lease operation, shall be accorded a monthly allowance while deprived of employment, equal to 60% of his average monthly compensation during the last 12 months of his employment. The period of such monthly allowance is as follows:

Length of Service:	Period of payment
1 yr. and less than 2 yrs	6 months.
2 yrs. and less than 3 yrs	12 months.
3 yrs. and less than 5 yrs	18 months.
5 yrs. and less than 10 yrs	36 months.
10 yrs. and less than 15 yrs	48 months.
15 yrs. and over	60 months.

The dismissal allowance ceases prior to the expiration of the prescribed period in the event of certain contingencies; and is subject to reduction in the case of employment elsewhere, if monthly earnings plus

dismissal allowances exceed his former railroad pay.

The report of the entire Commission also contained the following provisions:

> Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date.

Proof was made at the hearing before this Court that approximately 53 employes would lose their positions under the proposed lease; and that, should the conditions as to dismissed employes be carried out, the cost to the petitioners would be approximately $280,758 over a period of five years, and that compliance with the other conditions would cost the petitioners not less than $10,000.

There are no issues of fact involved, and the sole question to be determined is whether the Interstate Commerce Commision had the legal power to impose the conditions contained in the report of its

Division Four and adopted by the entire Commission in its report and order of April 3, 1939.

It is fundamental that the Commission can only exercise the authority legally delegated to it by Congress. *U. S.* v. *Penn. R. Co.*, 242 U. S. 208.

The statutory authority relied on is Section 5 (4) of the Interstate Commerce Act:

> (a) It shall be lawful, with the approval and authorization of the Commision, as provided in subdivision (b), for two or more carriers * * * to lease * * * the properties, or any part thereof, of another.
>
> (b) If after such hearing, the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

It is urged by the defendants that under the provision "and will promote the public interest," the Commission was within its legal powers in imposing the conditions hereinbefore stated. There can be no question but that the conditions imposed

by the Commission were very desirable from the standpoint of social welfare. However, our inquiry must be confined to a consideration of whether the Commission possessed the power and authority which it attempted to exercise.

This court feels bound by the interpretation of the phrase "and will promote the public interest" which the Supreme Court has heretofore given when it considered same in connection with the Interstate Commerce Act.

In the case of *New York Central Securities Company* v. *United States,* 287 U. S. 12, the Supreme Court in an opinion by Chief Justice Hughes, considered the words "public interest" and stated:

> The provisions now before us were among the additions made by Transportation Act, 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred.

In the case of *Texas et al.* v. *United States,* 292 U. S. 522, the court said:

> The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency

> Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *New York Central Securities Corp.* v. *United States, supra.*

In the case of *Schechter Corporation* v. *United States*, 295 U. S. 405, the court commented upon the powers which Congress had given to the Interstate Commerce Commission, and said (p. 540):

> When the Commission is authorized to issue, for the construction, extension, or abandonment of lines, a certificate of "public convenience and necessity," or to permit the acquisition by one carrier of the control of another, if that is found to be "in the public interest," we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation.

In the case of *West* v. *P. B. & W. R. Company* (Md.), 141 Atl. 509, the Railway Company desired to relocate its tracks and applied to the Public Service Commission of Maryland for its approval.

The Commission attached a proviso fixing the minimum grade for the new line which was different than the grade desired by the railroad. The Commission justified the condition imposed on the ground that the grade desired by the railroad would injure the adjacent property by obstructing the view, lessening light and air, etc. The court stated (p. 515):

> These quotations fairly reflect the purpose and scope of the entire statute, and it is manifest from an examination of it, as well as of them, that the public interest which is committed to the protection of the commission is the interest which the public has in the operation of the railroads in such a manner as to furnish efficient service at reasonable rates, and that the power of the commission over railroad companies lies within those limits—

and at (p. 516) stated further:

> But the "public" referred to in that section obviously means the whole public, and not a particular part of it owning property contiguous to the railroad. • • •

Under the repeated interpretation of our Supreme Court, it is clear that Congress has not delegated to the Commission the power to impose conditions which have to do with the private employer-employee relationship, by reason of the phrase "will promote the public interest."

It is persuasive, although not controlling, that the Commission itself had grave doubts as to their

authority to impose said conditions. The Commission divided six to four and, in addition, Commissioner Eastman, one of the majority, stated in his concurring opinion:

> While I think there is reasonable doubt whether, in approving this lease, we have power, as the law now stands, to attach a condition for the protection of the railroad employes who may be adversely affected thereby, such protection is desirable and in the public interest. * * *

Furthermore, in reports which the Commission made to Congress for the years 1935 and 1936, there were recommendations for further statutory provisions to protect employes from undue financial loss as a consequence of authorized railway unifications. Although Congress has amended the Interstate Commerce Act in other respects, it has made no change in paragraph (4) of Section 5.

The conditions which were made a part of the order of the Commission, dated April, 3, 1939, are beyond the power of the Interstate Commerce Commission to impose and are illegal and void; and the petitioners are entitled to an order enjoining, setting aside, annulling, and suspending that part of the order which refers to and consists of said conditions, and perpetually restraining and enjoining the defendants from enforcing or attempting to enforce that part of the order.

There can be no question that this court has jurisdiction of the subject matter and of the parties

to this suit, and has the power under the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220, to enjoin, annul, and set aside said conditions without enjoining, annulling, or setting aside said order in its entirety.

We desire to emphasize, however, that nothing contained in this opinion shall be construed as passing upon the validity of said order of the Interstate Commerce Commission, dated April 3, 1939, with said conditions annulled and set aside.

EVANS A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.
F. RYAN DUFFY,
United States District Judge.

Filed JULY 31, 1939.

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 343

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, APPELLEES

MOTION OF APPELLANTS TO ADVANCE

Pursuant to Rule 20, paragraph 3, of this Court, Appellants move that the Court advance this cause on its calendar and set it for argument and disposition at the earliest date consistent with the Court's convenience.

The District Court stayed its final decree pending the appeal to this Court, upon condition that Appellants present their appeal to this Court at the October Term, 1939, and apply on or before Octo-

ber 20, 1939, to this Court for an order advancing the cause (Tr. 126).

The statute which authorizes the direct appeal to this Court provides (Commerce Court Act, 36 Stat. 539; U. S. Code, Title 28, Sec. 47a):

> Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that Court.

As a result of the stay order of the District Court, the estate of which the Appellees are trustees will be required to incur an expense approximating $9,000 per month in salary or benefit payments to the affected employees pending the determination of the case by this Court and apparently no part of this expenditure can be recovered, even though the decree below be affirmed (Tr. 122).

ROBERT H. JACKSON,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

Counsel for the Appellees concur in the above motion to advance.

W. F. PETER,
Counsel for Appellees.

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